RECORD AND BRIEFS

No. 13-1318

JUL - 2 2014

In The

Supreme Court of the United States

TRACEY L. JOHNSON AND DAVID JAMES, JR.,

Petitioners,

vs.

CITY OF SHELBY, MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff who pleads a claim directly under the Fourteenth Amendment is entitled to have it construed as a claim for damages brought pursuant to 42 U.S.C. § 1983, despite failing to invoke that statute in his complaint.

PARTIES TO THE PROCEEDING

Petitioners are Tracey L. Johnson and David James, Jr. Respondent is the City of Shelby, Mississippi.

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INTRODUCTION

This is not, as the Petitioners contend, a case about a technical failure to cite a relevant statute. Rather, it is a case about two different sources of law – the Fourteenth Amendment and 42 U.S.C. § 1983 – that give rise to two different types of claims. Claims for injunctive or declaratory relief from an unconstitutional action may be brought directly under the Fourteenth Amendment. By contrast, claims for money damages stemming from Fourteenth Amendment due process violations must be brought via the statutory vehicle of 42 U.S.C. § 1983.

Petitioners chose to plead their claim directly under the Fourteenth Amendment. App. 21. They alleged they were terminated without due process. App. 24-25. Among their multiple claims and requested remedies was a request for injunctive relief in the form of "reinstatement." App. 26. Thus, Petitioners arguably satisfied Rule 8(a)(2) of the Federal Rules of Civil Procedure to the extent they sought injunctive relief directly under the Fourteenth Amendment.

Petitioners did not, however, invoke § 1983 or plead any facts showing that any due process violation had caused them monetary damages. App. 20-27. Thus, to the extent they sought money damages for a due process violation, Petitioners did not give "fair notice of what the [. . .] claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), *quoting Conley v. Gibson*, 355 U.S. 41, 47 (1957). Later, in their summary

judgment briefs, Petitioners conceded they really were seeking money damages available under § 1983, after all. The district court dismissed that claim, as it had never been raised in the complaint. App. 12-13.

Petitioners' argument rests on the assumption that these two types of claims are interchangeable, such that – whenever a party alleges a Fourteenth Amendment due process violation – opposing parties and courts must presume he means to bring a claim for money damages and read into the complaint a claim under 42 U.S.C. § 1983 if one is not pled. Below, the Fifth Circuit rightly rejected this notion that invoking § 1983 is a "mere pleading formality." App. 12, *citing Felton v. Polles*, 315 F.3d 470, 482 (5th Cir. 2002).

Pleading § 1983 informs public entities – and more importantly, individual public officials – that money damages are being sought from them, rather than just injunctive relief. This notice is critical, as money damage awards against individual officials can be financially devastating, and may spur them to seek their own counsel or to defend the case more aggressively than if only an injunction were at stake. Likewise, pleading § 1983 notifies the parties that fundamentally different standards of liability apply – specifically, that *respondeat superior* liability is not available and that individual defendants may invoke qualified immunity. Pleading directly under the Fourteenth Amendment, as the Petitioners did here, provides notice of none of these things.

There is no split among the circuits on this question, nor is there any other compelling reason to grant a writ of certiorari. Ultimately, this is a fact-bound, highly idiosyncratic case about an experienced civil rights lawyer who pled a claim directly under the Fourteenth Amendment when he meant to plead a claim for money damages under 42 U.S.C. § 1983. The plaintiff is the master of his complaint, so neither courts nor defendants should be obliged to guess as to what the plaintiff's lawyer subjectively intended. The Fifth Circuit applied this straightforward rule correctly, and thus the writ should be denied.

STATEMENT OF THE CASE

A. Factual Background

Although it is largely immaterial to the question presented in the petition, it is worth noting briefly that the Petitioners' account of the reasons for their termination is disputed by the Respondent.

Petitioners Tracey Johnson and David James, as police officers for the City of Shelby, Mississippi, made a practice of ignoring police procedure and the civil rights of residents. Shortly after James was hired, the City began receiving complaints that he was "profiling," targeting, and harassing residents for no reason. In April 2009, Petitioners were dispatched in response to a distress call at an apartment complex in Shelby. The City received complaints that the Petitioners were harassing residents who were not

the subject of the call. Residents of the apartment complex ultimately filed a petition alleging they had been "harassed and violated" by the Petitioners.

In May 2009, the City received a letter complaining that Officer James had entered the local housing authority and accused an employee, Mary Young, of "housing drug dealers" without any evidence. It appears this visit was an attempt to retaliate against Young, who days earlier had met with police officials to complain about James's harassing behavior.

To make a long story suitably brief, the City's Board of Aldermen considered a motion to terminate the Petitioners in July 2009, but it failed on a 2-2 vote. Shortly after the vote, the vehicles of the two aldermen who voted to terminate were burned. Two former City of Shelby police officers were arrested and charged with the crime. Then, in August 2009, the Petitioners were suspended after trying to have the victim of an auto theft lure the alleged thief back into the city limits to be arrested.

In September 2009, the Board again considered a motion to terminate the Petitioners' employment. This time, the motion carried by a vote of 3-2. On September 3rd, the city attorney advised the Petitioners of their termination. Officer James indicated he would appeal the decision. In October 2009, a grievance hearing was held and the Board upheld his termination.

B. Procedural History

The procedural history provided by Petitioners is largely accurate. Some important details are omitted or misstated, however.

First, this was not a case in which a plaintiff omitted a necessary pleading then promptly sought to amend his complaint and add it. Instead, Petitioners' first and only request to amend their complaint to incorporate 42 U.S.C. § 1983 came via a motion for post-judgment relief under Rule 59(e) of the Federal Rules of Civil Procedure nearly thirty days after summary judgment was entered. As the Fifth Circuit noted, Petitioners "waited until they lost on one theory and then sought to upset the finality of the district court's judgment by introducing a new theory." App. 7. The Fifth Circuit held it was not an abuse of discretion to deny this belated request. *Id.*

Second, Petitioners assert that the district court "granted summary judgment on the sole ground that Petitioners had failed to cite in their complaint the statute (42 U.S.C. § 1983), which authorizes the cause of action." Pet. 5, *citing* App. 12-13. That is not what the district court held. Petitioners steadfastly refuse to accept that there is such a thing as a claim brought directly under the Fourteenth Amendment, but the district court did not adopt that fiction. Instead, the Court held that "a claimant may not recover from state and local officials for a constitutional violation through means of an action directly under the Fourteenth Amendment." App. 12.

In short, the district court correctly construed Petitioners' complaint as raising a direct action under the Fourteenth Amendment. After all, Petitioners' complaint did request injunctive relief in the form of "reinstatement" and did not allege facts showing monetary injury. App. 24-26. However, Petitioners conceded in their summary judgment brief that they actually were seeking money damages under § 1983, not the declaratory or injunctive relief available directly under the Fourteenth Amendment. The district court rightly dismissed that claim, as it was not pled in the complaint.

As discussed below, pleading under 42 U.S.C. § 1983 provides notice that a claimant seeks to recover money damages from a government defendant – or, as here, an individual public official. Because no such notice was provided in the complaint, the district court followed Fifth Circuit precedent and dismissed the Fourteenth Amendment claim.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit Correctly Held That Courts And Opposing Parties Are Not Required To Infer A § 1983 Claim For Damages When A Plaintiff Elects To Sue Directly Under The Fourteenth Amendment.

Petitioners' arguments all hang on the assumption that a complaint alleging a violation of the Due

Process Clause of the Fourteenth Amendment must necessarily also be a claim for money damages under 42 U.S.C. § 1983. That simply is wrong.

Claims for injunctive or declaratory relief from an unconstitutional action or law may be brought directly under the Fourteenth Amendment. This Court has recognized the availability of such claims, noting that the Fourteenth Amendment "is undoubtedly self-executing without any ancillary legislation." *Civil Rights Cases*, 109 U.S. 3, 20 (1883); *see also Ex parte Young*, 209 U.S. 123 (1908) (approving issuance of injunctive relief claimed directly under Fourteenth Amendment). Further, in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), this Court repeatedly observed that § 1983 provides the exclusive remedy where a claim is for "damages," thus implicitly recognizing what it previously held: that non-monetary relief is available directly under the Fourteenth Amendment.

As one district court put it, the enactment of § 1983 "did not strip citizens of standing to bring direct challenges under the Fourteenth Amendment." *Davis v. Commonwealth Election Comm.*, 2014 WL 2111065 at *7 (D. N. Mar. I. 2014). Other courts have reached the same conclusion. *See, e.g., Robinson v. Kansas,* 295 F.3d 1183, 1191 (10th Cir. 2002) (party "may seek prospective injunctive relief against state officials" directly under Fourteenth Amendment); *Rubenstein v. Benedictine Hosp.*, 790 F. Supp. 396, 407 (N.D.N.Y. 1992) (plaintiffs adequately pled due

process claim for "declaratory and injunctive relief directly under the Fourteenth Amendment").

Rather than serve as the "implementing legislation" for the Due Process Clause of the Fourteenth Amendment, 42 U.S.C. § 1983 creates a separate cause of action for damages, which are not available via a direct constitutional claim. *See, e.g., Jett*, 491 U.S. at 704-05, 714; *see also Magana v. Com. of the Northern Mariana Islands,* 107 F.3d 1436 (9th Cir. 1997) ("action for money damages" may not be brought directly under Fourteenth Amendment).

Because the claim and the stakes are fundamentally different, this Court has recognized that the standards for liability under § 1983 are likewise different. For instance, there is no *respondeat superior* liability under § 1983. *See, e.g., Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 122-23 (1992). Municipal liability attaches only where "a deliberate choice to follow a course of action is made from among various alternatives by [the relevant] officials." *Connick v. Thompson*, 131 S.Ct. 1350, 1360 (2011), *quoting Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986). Likewise, this Court has recognized that individual public officials' fear of monetary liability under § 1983 justifies a grant of qualified immunity:

> Under § 1983 [. . .] a plaintiff may seek money damages from government officials who have violated her constitutional or statutory rights. But to ensure that fear of liability will not "unduly inhibit officials in the discharge of their duties," *Anderson v.*

> *Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the officials may claim qualified immunity; so long as they have not violated a "clearly established" right, they are shielded from personal liability, *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

Camreta v. Greene, 131 S.Ct. 2020, 2030-31 (2011). Where a plaintiff seeks only injunctive relief, no such immunity is available. *See, e.g., Rogers v. Miller*, 57 F.3d 986, 989 n. 4 (11th Cir. 1995) ("The qualified immunity defense has no application to [. . .] attempts to gain injunctive relief.").

Lower courts have had no trouble recognizing this basic distinction or its implications. In *Farmer v. Ramsay*, for example, the district court held that claims for damages brought directly under the Fourteenth Amendment were properly dismissed, but that "claim[s] for injunctive relief involve[ ] a different analysis" and "are permissible directly under the 14th Amendment." 41 F. Supp. 2d 587, 591 (D. Md. 1999).

Once the distinction between § 1983 damages claims and direct claims under the Fourteenth Amendment is clarified, the Petitioners' argument is reduced to an assertion that courts and opposing parties should be required to assume that a plaintiff asserting a Fourteenth Amendment violation necessarily means to assert a claim for damages under § 1983. The Fifth Circuit rejected this implicit burden-shifting argument long ago: where a party "does not rely on any statute or common law doctrine which

might authorize [. . .] a suit in the federal courts, we must assume that [the party] wishes us to hold that the Fourteenth Amendment alone provides a basis for relief in this case." *Hearth, Inc. v. Department of Public Welfare*, 617 F.2d 381, 382 (5th Cir. 1980). This reasonable approach assigns to plaintiffs the light burden of notifying defendant municipalities and public officials if they intend to seek money damages for an alleged constitutional violation, rather than just injunctive relief.

Petitioners point to this Court's admonitions against "heightened pleading standards," but no such standards are at issue here. *See* Pet. 7, *citing Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). This is not a case in which the lower court demanded some formal recitation beyond what Rule 8 requires. Nor is it a case about the quantum of factual allegations necessary to avoid dismissal. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Twombly*, 550 U.S. 544. As noted above, it is a case in which two different claims were available, with the invocation of the Fourteenth Amendment alone providing notice of one, and the invocation of the Fourteenth Amendment and 42 U.S.C. § 1983 in tandem providing notice of another. Petitioners simply did not meet their burden under Rule 8(a)(2) of alleging a claim for damages against the municipal and individual defendants.

Petitioners also point to dicta from this Court's opinion in *Gomez v. Toledo*, 446 U.S. 635 (1980). However, *Gomez* addressed only the narrow question

whether a § 1983 plaintiff was required to plead bad faith on the part of the government official, or alternatively, whether good faith was properly raised as part of an affirmative defense of qualified immunity. *See id.* at 635-36. The Court found the latter and reversed. *See id.* at 638-42. The petitioner invoked § 1983 in his complaint and demanded backpay, so – unlike this case – there was clear and explicit notice of the nature of claim against the official. *See id.* at 636-37. In short, *Gomez* is wholly inapposite here.

Finally, Petitioners note that, in this particular case, counsel for the Respondent correctly anticipated that – despite the failure to plead § 1983 – Petitioners' attorney might have subjectively intended to seek money damages. *See* Pet. 10. Consequently, in an abundance of caution, Respondents pled an affirmative defense under that statute. *See id.* However, this point only illustrates just how fact-bound and idiosyncratic the dispute here is.

Petitioners' counsel is among the most experienced plaintiff attorneys in Mississippi. Respondent's counsel has litigated many dozens of municipal civil rights cases against him. As a result, Respondent's counsel has learned to anticipate the intentions of Petitioners' counsel, even where the complaint fails to make them clear. In particular, Respondent's counsel knew that Petitioners' counsel recently had another direct Fourteenth Amendment claim dismissed because of failure to plead § 1983, and had other complaints dismissed for the same reason before. *See Lofton v. City of West Point, Miss.*, 2012 WL 1135862

at *10 (N.D. Miss. 2012). In short, Respondent's counsel was aware Petitioners' counsel might later try to convert his direct Fourteenth Amendment action into a § 1983 damages claim, as he attempted to do in other cases. Thus, Respondent's counsel raised a defense to § 1983 in case the district court erred and permitted such a reversal in course.

In other words, one specific attorney was able to read the tea leaves and anticipate an attempt to raise an unpled claim due to years of experience litigating against another specific attorney. Other counsel should not have to read the tea leaves. Rule 8 requires only that they read the complaint. Here, the complaint contained a direct action under the Fourteenth Amendment, including a request for injunctive relief in the form of "reinstatement." App. 20-26.

The district court and the Fifth Circuit correctly applied a straightforward rule. That rule assigns plaintiffs the light burden of notifying public entities and officials – normally by invoking 42 U.S.C. § 1983 – if they intend to seek damages rather than the injunctive relief available directly under the Constitution. This is consistent with this Court's mandate that pleadings provide "fair notice of what the [. . .] claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. Petitioners have failed to provide any compelling justification for review here, so the writ should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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